IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

WALTER H. DUISBERG,

Petitioner and Appellant below,

v.

JAMES E. MARKHAM, as Alien Property Custodian,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

No opinion was rendered in the District Court on the disposition of this action.

The opinion rendered by the Circuit Court of Appeals for the Third Circuit, on May 25, 1945, has not been officially reported. The opinion is printed in full in the record (R. 73).

Jurisdiction

The "Jurisdictional Statement" (pp. 5-6) in the preceding petition is hereby adopted and made a part of this brief.

Statement of the Case

The "Statement of the Matter Involved" (pp. 1-5) in the preceding petition is hereby adopted and made a part of this brief.

Specification of Errors

1. The Circuit Court of Appeals for the Third Circuit erred in holding that the denial of plaintiff's motion for a voluntary dismissal under Rule 41(a)(2) was not a clear abuse of discretion by the District Court.*

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the granting of defendant's motion for an involuntary dismissal under Rule 41(b), without specification that said dismissal was to be without prejudice, was not a clear abuse of discretion by the District Court.

ARGUMENT

Summary of the Argument

Petitioner believes that the District Court was grievously in error in denying petitioner's application for a continuance of the trial. But petitioner does not advance error in that respect as a reason for this application for a writ of certiorari. The questions which will here be raised are whether the District Court was in error in denying petitioner's motion for a voluntary dismissal under Rule 41(a)(2), and whether the District Court was in error in granting respondent's motion for an involuntary dismissal under Rule 41(b) without specification that said dismissal was to be without prejudice. Petitioner's position is that the District Court abnegated the judicial discretion vested

* To the extent that Judge Smith's order of June 9, 1944, provided that any voluntary nonsuit thereafter taken would be with prejudice, it is included in this specification of error.

in it when it failed to require defendant to specify all respects in which he would be prejudiced or damaged by a dismissal, voluntary or involuntary, and when it failed to determine whether such prejudice or damage could be completely obviated by the imposition of appropriate terms and conditions.

POINT I

Prior to the decision in the instant case, the District Courts had interpreted Rule 41(a)(2) as meaning that a motion by plaintiff for a voluntary dismissal before commencement of trial must be granted unless such voluntary dismissal would cause defendant legal prejudice or damage which could not be obviated by the imposition of appropriate terms and conditions.

Prior to the decision in the instant case the District Courts had interpreted Rule 41(a)(2) as imposing upon them the duty of determining whether a voluntary nonsuit before commencement of trial could be granted without causing defendant legal prejudice or damage not obviatable by the imposition of appropriate terms and conditions, and of determining what those terms and conditions should be.

The leading case is *McCann* v. *Bentley Stores Corp.*, 34 F. Supp. 234 (D. Ct., W. D. Mo. 1940), where an action had been pending for four years, and there had been an unsuccessful motion to remand, before plaintiff moved to dismiss without prejudice under Rule 41(a)(2). The court stated (pp. 234-235):

> "I consider that paragraph (2) of Rule 41(a) is one of the most valuable improvements over the old law accomplished by the new rules. * * *
>
> "When the Supreme Court promulgated this rule and provided that the court might permit a dismissal without prejudice 'upon such terms and conditions as the court deems proper' what sort of 'terms and conditions' was contemplated? I have found nothing in the

books upon which to base an answer, but *no 'terms and conditions' are conceivable except such as are calculated to compensate the defendant for the expense to which he has been put.*" [Italics ours.]

In *Welter* v. *E. I. Du Pont De Nemours & Co., Inc.*, 1 F. R. D. 551 (D. Ct., D. Minn. 1941), the action had been pending for over a year, there had been four pre-trial motions, and defendant had made extensive preparations for trial, before plaintiff moved to dismiss without prejudice under Rule 41(a)(2). The court granted the motion upon condition that plaintiff pay defendant the sum of $200. Citing the *McCann* case, the court stated (pp. 552-554):

"Under Rule 41(a)(2), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, plaintiff does not have the right to dismiss without consent of court. If one is to weigh the equities, it must be recognized that plaintiff will put defendants to unnecessary expense and delay without cause if the case is dismissed. No reason for dismissal now exists which did not prevail before answer was served. Rule 41(a)(2) was undoubtedly framed so as to prevent the voluntary dismissal of an action on the mere whim of the plaintiff after answer is served. Where defendants have gone to considerable trouble and expense in preparing for trial and the matter has been pending for over a year and no equities are shown or made to appear in behalf of the plaintiff's motion for dismissal, it seems evident that the court would abuse its discretion in permitting such dismissal and relegating the defendants to a few dollars by way of statutory costs. But *unless it appears that reasonable terms and conditions cannot make the defendants reasonably whole, I question that the court should deny the motion. The right to dismiss before verdict has been long recognized by our courts.* • • •

"A dismissal will result in a prejudice which is solely monetary and which can be substantially removed by plaintiff's compliance with terms and conditions as a right to a dismissal. However, if plaintiff desires now to avail himself of his right to dismiss in this court and subject defendants to another lawsuit in State Court on the same issues, he should be required to pay the reasonable costs and attorneys' fees incurred herein

by the defendants. It is fair to presume that the present rule 41(a)(2) was promulgated for that very purpose." [Italics ours.]

In *Gold* v. *Geo. T. Moore Sons, Inc.*, 3 F. R. D. 201 (D. Ct., S. D. N. Y. 1943), the action had been pending for almost one year before plaintiffs moved, *on the day set for trial,* to dismiss without prejudice under Rule 41(a)(2). The pre-trial proceedings had been most extensive, as is partly indicated by the following brief excerpt from the opinion (p. 201):

> "Since issue was joined, plaintiffs' counsel has examined an officer of defendant, pursuant to Rules 26 and 30(c), Federal Rules of Civil Procedure. Likewise Abraham Gold has been examined by defendant's attorney. Defendant's attorney states that soon after suit was brought he called counsel for plaintiffs and showed him that defendant had made the alleged infringing device nineteen months before plaintiffs claimed to have conceived the idea, but plaintiffs insisted on going on with the litigation. It therefore became necessary for defendant to prepare for trial. This involved conferences, examination of corporate records, a search of the patent office to discover the state of the prior art, examination of some nine patents, the taking of depositions, conferences with witnesses and the preparation of a trial brief."

The court noted that plaintiffs' default was a willful and intentional default on the day of trial, and that plaintiffs admittedly had had no intention of proceeding to trial in their action, which apparently was an unfounded one. Nevertheless the court felt constrained to grant their motion for a dismissal without prejudice under Rule 41(a)(2), and ruled that its only task was to determine the terms and conditions which would make defendant whole upon such voluntary dismissal. Citing the *McCann* case, the court stated (p. 202):

> "I am adding that condition because *it seems to me that plaintiffs are in effect defaulting yet wish to avoid*

> *the effect of a failure to prosecute the action, which would entitle the defendant to move for a dismissal of the action.* Under Rule 41(b), Federal Rules of Civil Procedure, such a dismissal, unless the order otherwise directed would operate as a dismissal upon the merits. * * *
>
> "At the hearing on June 8th plaintiffs' attorney stated that plaintiffs intended to drop the litigation, but he would not consent to a dismissal with prejudice. Since a dismissal under Rule 41(a)(2) is without prejudice unless otherwise specified in the order, I will grant plaintiffs' request for a dismissal without prejudice on condition that plaintiffs within ten days of the entry of the order pay defendant $327.74, as hereinabove indicated, and if said payment is not so made, the dismissal shall be with prejudice." [Italics ours.]

Even in the foregoing case where, as the court expressly noted, "plaintiffs have practically walked out on this litigation," plaintiffs were afforded an opportunity to save their cause of action by payment of $327.74.

In *United States* v. *Elm Spring Farm Co.*, 3 F. R. D. 43 (D. Ct., D. Mass. 1942), the action had been pending for a year and a half, and there had been some pre-trial motions, before plaintiff (the government) moved to dismiss without prejudice under Rule 41(a)(2). The court flatly stated the prevailing position of the District Courts, which from the viewpoint of elementary fairness and equity is the only tenable position (p. 44):

> "The defendants now insist that if the Government's motion is allowed, it should be with prejudice. *Since there has been no hearing on the merits, such a contention cannot prevail.*" [Italics ours.]

In *Ryerson & Haynes, Inc.* v. *American Forging & Socket Co.*, 2 F. R. D. 343 (D. Ct., E. D. Mich. 1942), plaintiff sued for alleged patent infringement. Defendant filed "a detailed answer to the complaint, pleading especially non-infringement and invalidity of plaintiff's patents for various reasons." Plaintiff waited until the pre-trial hearing

before moving to dismiss without prejudice under Rule 41(a)(2). The court stated (p. 343):

> *"In accordance with Rule 41(a)(2)*, it is hereby ordered that the above-entitled cause be, and the same is, hereby dismissed and discontinued without prejudice to plaintiff's rights provided that prior to the institution of another suit upon the cause of action here involved plaintiff pays to defendant all of its taxable costs and all expenses incurred by said defendant in preparation for this case, said costs and expenses to be determined by the court prior to the time such second suit is commenced." [Italics ours.]

It is of especial interest that the foregoing decision was rendered by Judge Lederle, who denied the motion made under Rule 41(a)(2) in the instant case. A reading of Judge Lederle's opinion reveals clearly that in the *Ryerson* case he proceeded upon the correct principle that his only discretion "in accordance with" the rule was to determine the terms and conditions which would make defendant reasonably whole. It will be noted, however, that the formula adopted by him for the determination of such terms and conditions represents the imposition of a *condition subsequent*. So far as is revealed in the reported cases, never before or since Judge Lederle's decision in the *Ryerson* case has a judge imposed any but a *condition precedent* to dismissal without prejudice. In the very next reported case arising under Rule 41(a)(2)—the *Mott* case, *infra* (p. 16)—the court expressly rejected Judge Lederle's "condition subsequent" formula as impractical and unduly favorable to plaintiff.

In the instant case the learned Judge, swinging full pendulum, has completely rejected the notion of conditions (whether subsequent or precedent) to a dismissal without prejudice, even though appropriate conditions could have been devised and imposed which would have completely obviated prejudice. The entire situation is clearly one of

the exercise of a personal discretion—not a judicial discretion.

Motions to dismiss without prejudice under Rule 41(a)-(2) were granted also in the following cases:

United States v. *Commercial Solvents Corp. of Del.*, 25 F. Supp. 653 (D. Ct., D. Del. 1938): action pending three years; prior unsuccessful motion by defendant to dismiss for want of prosecution; no terms imposed.

Lawson v. *Moore*, 29 F. Supp. 175 (D. Ct., W. D. Va. 1939): plaintiff required to pay the costs in the action.

Contracting Div., A. C. Horn Corp. v. *New York Life Ins. Co.*, 113 F. 2d 864 (C. C. A. 2d 1940), affirming S. D. N. Y.: action pending two years; plaintiff required to pay the costs in the action.

Taylor v. *Swift & Co.*, 2 F. R. D. 424 (D. Ct., S. D. Fla. 1942): plaintiff required to pay $258.80; citing the *McCann* case.

Mott v. *Connecticut Gen. Life Ins. Co.*, 2 F. R. D. 523 (D. Ct., N. D. Ia. 1942): defendant prepared and ready for trial; plaintiff required to pay the costs in the action plus $100; citing the *McCann* case.

McLean v. *Wabash R. Co.*, 3 F. R. D. 172 (D. Ct., W. D. Mo. 1942): no terms imposed.

Hannah v. *Lowden*, 3 F. R. D. 52 (D. Ct., W. D. Okla. 1943): plaintiff required to pay $160; citing the *McCann* case.

Derman v. *Stor-Aid, Inc.*, 7 F. R. Serv. 637 (D. Ct., S. D. N. Y. 1943): defendants incurred $12,500 expenses in preparation for trial; plaintiff required to pay $5,000.

In all thirteen cases cited *supra* (pp. 11-16), plaintiffs' motions to dismiss without prejudice under Rule 41(a)(2) were granted, despite the fact that they involved actions pending for as long as four years, actions in which there had been many pre-trial motions and extensive pre-trial proceedings, actions in which defendants had made extensive and expensive preparations for trial and were ready

and prepared for trial, and actions in which plaintiffs waited until the day of trial before moving for involuntary dismissal. The dismissals without prejudice were either without terms, or on condition subsequent (Judge Lederle's unprecedented and unfollowed decision), or on terms varying from costs in the action to a maximum of $5,000 (in an action wherein defendants had expended $12,500 in preparation for trial). In the instant action alone has a court thought it proper to penalize plaintiff in a sum approximating a million dollars for seeking an involuntary dismissal under Rule 41(a)(2). In all the other actions, plaintiff was accorded an opportunity to obviate prejudice or damage sustained by defendant as a result of the involuntary dismissal; in the instant action alone, he was not.

It is respectfully submitted that the discrepancy between the interpretation of Rule 41(a)(2) displayed in the foregoing thirteen cases and that displayed in the instant case is such as to commend to this court the necessity for an authoritative interpretation of the extent of the discretion vested in a District Court under Rule 41(a)(2).

POINT II

In granting defendant's motion for an involuntary dismissal under Rule 41(b), without specification that the dismissal was to be without prejudice, the District Court predicated its decision upon an erroneous interpretation of that rule.

Even though defendant asserted no prejudice which plaintiff did not offer to obviate by stipulation, the position of the District Court was that an involuntary dismissal under Rule 41(b) should be with prejudice. Whether the court's interpretation of Rule 41(b) was that it was *required* to dismiss with prejudice, or whether the court's interpretation of Rule 41(b) was that even though there had been no trial and no assertion of non-obviatable prejudice the court

was *empowered* to dismiss with prejudice, the court was equally in error.

In *Russo* v. *Sofia Bros., Inc.*, 2 F. R. D. 80 (D. Ct., S. D. N. Y. 1941), plaintiff's complaint had been dismissed before trial, without leave to amend, on defendant's motion under Rule 41(b). Plaintiff moved for leave to file an amended complaint. The question before the court was whether the prior dismissal under Rule 41(b), without specification whether it was with or without prejudice, operated as an adjudication on the merits. The court ruled that even though the prior order had not specified that it was without prejudice, the dismissal must, despite the language of Rule 41(b), operate as a dismissal without prejudice. The court stated (pp. 81-82):

> "It is pointed out by Professor Moore that *the objective of the new rules is to secure a disposition of litigation on the merits* rather than by collateral methods. Rule 1, F. R. C. P., dictates that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. • • •
>
> "*Clearly, there has been no trial of the issues.* • • • In other words, *objectively considered, there has been no disposition of plaintiff's claim on the merits.* Are we constrained by a fiction to so treat it by the command of Rule 41?
>
> "I have searched vainly for a judicial interpretation of its language as it affects the problem here presented. The Notes of the Reporter to the Advisory Committee on the rules read: 'Note to subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.' • • •
>
> "The compilation of data gleaned from the Symposia on the Rules under the Auspices of the American Bar Association • • • See: Proceedings of the American Bar Association Institute, Cleveland, pp. 308, 350; Washington and New York, pp. 118, 137, 156, 165 and

277. These discussions reveal the Rule in its primary function, as a device during trial to prevent the recurrence of litigation that had reached that advanced stage.

"The place that this rule occupies in the numerical order of the rules, as part of Chapter VI, entitled Trials, rules 38-53, tends to characterize it primarily as controlling the action at or after the trial.

"To extend the operation of this rule to the instant motion would, I believe, *create a penalty and a forfeiture which was not contemplated by the framers of the Rules.*" [Italics ours.]

POINT III

The District Court improperly exercised a personal discretion unrelated to any sound concept of judicial discretion, violative of the equities involved, and departing drastically from the accepted and usual course of judicial proceedings.

In the exercise of a supposed "discretion," petitioner's fortune has been confiscated. Even if petitioner were in the wrong in not obeying the order of the District Court that, on only a few days' preparation for trial after joinder of issue, he proceed to a three-to-seven week trial involving, as the government itself stated, "extremely complex" proof with respect to "the most important properties * * * monetarily" which the Alien Property Custodian had taken over in the war (R. 69a-70a, 80a, 84a, 36), only a court misled by some concept of personal discretion could have thought that the proper penalty for such an offense was the confiscation of plaintiff's fortune. A proper understanding of judicial discretion would have resulted in according greater consideration to the fact that petitioner's refusal to proceed to trial had resulted in no non-obviatable prejudice or damage to defendant, and would therefore inevitably have led to a different result.

The proper considerations to be weighed in the exercise of the discretion vested in a court under Rule 41(a)(2)

have been indicated in *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (C. C. A. 8th 1943), wherein the court stated (pp. 316-318):

> "The effect of this rule is to confer upon the court in all civil actions the equitable power to impose upon a plaintiff seeking to dismiss without prejudice 'such terms and conditions as the court deems proper.' • • •
>
> "The judicial discretion of the trial court in permitting a plaintiff to dismiss his suit under rule 41 after answer is filed does not extend to a refusal to apply well-settled principles of law to a conceded or undisputable state of facts. • • •
>
> "Since rule 41 is declaratory of a long established practice in the courts and is intended only to clarify and make definite that practice, it should be construed with reference to the precedents. Prior to the adoption of the Rules of Civil Procedure the Supreme Court and the inferior federal courts had applied the rule in the cases cited supra and in many other cases. The decisions were reviewed at length by Judge Kenyon in United Motors Service v. Tropic-Aire, supra [57 F. 2d 479], wherein he said that the question to be determined upon appeal from an order granting a dismissal without prejudice after trial at the instance of the plaintiff is: 'Did defendant lose any substantial right by the dismissal?' [57 F. 2d 482.] That, in brief, is the issue on the present appeal.
>
> "The defendant contends that it lost (1) its adjudicated right to the payment of costs, and (2) its alleged right to freedom from suit in another court upon the same cause of action. • • •
>
> "The order of dismissal without prejudice upon the application of plaintiff should have been conditioned upon the payment of costs. See McCann v. Bentley Stores Corp., D. C. Mo., 34 F. Supp. 234; United States v. Lyman, 1 Cir., 125 F. 2d 67.
>
> "The defendant's second contention is that a dismissal without prejudice will deprive it of its alleged right to freedom from suit in another court upon the same cause of action. The defendant does not have such an absolute right under the rule."

Perhaps the clearest expression of the significance of Rule 41(a)(2) and of the considerations to be weighed in its application is to be found in a very recent dissenting opinion by Circuit Judge Woodrough, in *Federal Sav. & Loan Ins. Corp.* v. *Reeves,* 148 F. 2d 731 (C. C. A. 8th 1945). In that case, plaintiff petitioned for a writ of mandamus directing the respondent judge to grant its motion to dismiss its action without prejudice. The decision of the majority went upon the ground that since Rule 41(a)(2) vests a judicial discretion in the District Court, mandamus cannot properly issue. Petitioner in the instant case does not question the correctness of the majority opinion in the cited case on the issue of the appropriate use of a writ of mandamus; petitioner quotes from the dissenting opinion only for its analysis of the proper interpretation of Rule 41(a)(2). That opinion states (p. 733):

> "The question is of far-reaching importance. The right of plaintiff to dismiss without prejudice before trial is a peculiar one which has persisted a very long time and survived many codifications and attacks. It has endured as a refuge for the weak in the hour of their confrontation with the ordeal of trial. The right is in essence of the same nature as the right of trial by jury. Both are practical means, from wisdom and experience, tending to palliate inequality of position between litigants.
>
> "*Certainly there is nothing in the rule declaring that the traditional right of plaintiffs to dismiss without prejudice before trial shall be abolished. Whether such a long-cherished right of plaintiffs could be substantially impaired by mere rules of court need not be gone into. It is clear the rule-makers recognized the right as continuing and had no thought to abrogate it.* As we pointed out in Home Owners' Loan Corporation v. Huffman, 8 Cir., 134 F. 2d 314, the rule is merely declaratory of long-established practice. The facts in that case illustrated the abuse of the right of plaintiffs which the rule is designed to prevent. Plaintiffs who have court costs piled up against them for which they are liable but will not pay, are prevented by the rule from taking their claims out of the court and perhaps

into some other forum except under court orders and on proper terms in the court's discretion respecting satisfaction of their costs. They may be required to pay such costs in whole or part, forthwith or on terms, and the discretion is to get the costs paid but to preserve the plaintiffs' right consistently with compelling their payment. As the exercise of the right to dismiss always and universally left the plaintiff indebted for the taxable costs, the interpretation we gave the rule in the Huffman case affords means to make plaintiffs do what they were legally obligated to do, and no substantial right was denied them by that interpretation.

"I think the contrary interpretation and application in this case is not in accord with the true intendment of the rule. The 'proper conditions' of dismissal referred to in the rule do not include every condition that may appeal to a federal judge as an individual. They mean 'conditions' compatible with the maintenance of the right of plaintiffs to dismiss at their costs, substantially as it is, and traditionally has been recognized in state statutes and in the practice of the courts, including the federal courts." [Italics ours.]

In the instant case, the Circuit Court of Appeals for the Third Circuit thought it was relegated merely to a determination of whether there was a "clear abuse" of discretion by the District Court. An appellate court is not so limited. The facts are as fully before this court as they were before the District Court and, even apart from the question of whether there was a "clear abuse" of discretion by the District Court, it is respectfully submitted that this court may exercise its independent discretion on the facts.

See *In re A. Roth Co., Inc.*, 125 F. 2d 396 (C. C. A. 7th 1942), wherein the court stated (p. 398):

"Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate court's review does not include trial court's discretion.

> "If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge, we are in about as good a position as he to say whether the discretion has been wisely exercised. In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment."

Finally, the problem of interpretation of Rule 41 herein involved is peculiarly of the type requiring the exercise by this court of its power of supervision to see that justice is done. The District Court has applied one of the rules promulgated by this court in such a manner as to effectuate a confiscation of plaintiff's fortune. Perhaps the rules *can* be tortured and twisted into a technical construction which would justify the action taken in the instant case. But if that be so, then it is respectfully submitted that this court should grant relief from rules promulgated by it which have enabled such a result to be achieved.

See *In re Barnett*, 124 F. 2d 1005 (C. C. A. 2d 1942), wherein the court stated (p. 1010):

> "But adherence to a stricter procedure in such cases seems to us to derive from an excessive veneration for what Wigmore and others have properly criticized as the 'sporting theory of justice.' * * *
>
> "That theory stems from the original function of trials in courts as substitutes for private wars. That function, to be sure, is still of prime importance. * * * But we think that courts, in civilized communities, should do more than decide cases, one way or another, without regard to considerations of justice, merely to prevent private brawls and breaches of the peace. Government having, through its courts, established, in large areas, a monopoly of dispute-deciding, should try, as far as possible, to decide cases correctly—both by ascertaining the actual facts, as near as may be, and then by applying correct legal rules in an effort to do justice to the parties affected by their decisions. And not merely the parties, but the public as well, are interested that justice shall be done. The Supreme Court

has said that 'a trial in court is never * * * "purely a private controversy * * * of no importance to the public."' While the obligation to do justice does not mean, of course, that courts can act ad lib, the fact that such tribunals are called 'courts of justice' is surely not without any significance. We should no longer look upon a lawsuit as if it were 'in the nature of a cock-fight,' so that 'the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs.'"

POINT IV

Judge Smith's order of June 9, 1944, was erroneous and prejudicial.

If Judge Smith's order of June 9, 1944, constituted an anticipatory decision of the motions under Rules 41(a)(2) and 41(b) thereafter made before Judge Lederle, it was clearly erroneous. If it did not, it was clearly prejudicial.

If Judge Smith's order was an anticipatory decision of motions thereafter made before Judge Lederle, the error involved is obvious. Until the motions were made and until the defendant had presented to the court his proof demonstrating that he would sustain non-obviatable prejudice or damage as a result of a dismissal, voluntary or involuntary, the court was in no position to exercise any discretion or to determine whether such motions, when made, should be granted with or without prejudice.

If, on the other hand, Judge Smith did not, by his order, intend to dismiss this action with prejudice in the event that any motion for a dismissal were thereafter to be made, but was merely making a statement which was to constitute a recommendation to any judge before whom such motion might subsequently be made, then Judge Smith's statement was highly prejudicial to petitioner and inevitably affected the consideration given to his motion when it was thereafter actually made before Judge Lederle.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

ABRAHAM HORNSTEIN,
Counsel for Petitioner.

Of Counsel:
GAREY, DESVERNINE & GAREY,
RICHARD J. FITZMAURICE.

(33)

FILED
AUG 31 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG,
Petitioner and Appellant below,

v.

JAMES E. MARKHAM, as Alien Property Custodian,
Respondent and Appellee below.

ADDITIONAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ABRAHAM HORNSTEIN,
Counsel for Petitioner,
No. 63 Wall Street,
New York 5, New York.

Of Counsel:
GAREY, DESVERNINE & GAREY,
No. 63 Wall Street,
New York 5, New York.

RICHARD J. FITZMAURICE,
No. 310 Main Street,
Orange, New Jersey.

INDEX

PAGE

POINT V—The application of Rules 41(a)(2) and 41(b) in this case violated the due process clause of the Constitution 1

AUTHORITY CITED

Amendments to the Constitution:
Article V 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG,
Petitioner and Appellant below,

v.

JAMES E. MARKHAM, as Alien Property Custodian,
Respondent and Appellee below.

ADDITIONAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Supplementing the brief heretofore filed herein, petitioner respectfully submits:

POINT V

The application of Rules 41(a)(2) and 41(b) in this case violated the due process clause of the Constitution.

Article V of the Amendments to the Constitution of the United States provides that "no person shall * * * be deprived of * * * property, without due process of law."

If Rules 41(a)(2) and 41(b) are susceptible of the interpretation placed upon them in the instant case, then they constitute a clear violation of the foregoing constitutional provision, inasmuch as, thus interpreted, they effectuate a confiscation of plaintiff's property.

A statute (and *a fortiori* a rule of court) will not be construed so as to make its application violative of the Constitution, where it is capable of a construction which would make its application not violative of the Constitution. As has been shown in the preceding points, the interpretation given to Rules 41(a)(2) and 41(b) prior to the decision in the instant case did *not* bring those Rules into conflict with constitutional limitations.

By interpreting Rules 41(a)(2) and 41(b) as sanctioning a dismissal with prejudice *only* in cases of non-obviatable prejudice, the Rules can be saved from conflict with the constitutional prohibition against deprivation of property without due process of law.

Therefore, petitioner respectfully submits that the Rules should in this case be given a construction consistent with the Constitution, and that a dismissal with prejudice of an action wherein there was no non-obviatable prejudice should not be sanctioned.

Respectfully submitted,

ABRAHAM HORNSTEIN,
Counsel for Petitioner.

Of Counsel:
GAREY, DESVERNINE & GAREY,
RICHARD J. FITZMAURICE.